No. 80-1407

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THOMAS M. WINTERS and ELENA WINTERS,

Appellants,

v.

CITY OF KLAMATH FALLS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OREGON

# REPLY TO MOTION TO DISMISS OR AFFIRM

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## ARGUMENT

Appellee's Motion to Dismiss or Affirm is based on a misunderstanding of the basic issue presented by the instant appeal. The issue is not whether a state can establish different appellate systems for different types of cases or for different parts of the state. Rather, the issue is whether a state can effectively deny some criminal defendants a right to appeal to correct trial-court errors.[1]

As the cases cited by appellants and appellee establish, a state generally is free to establish different appellate systems within the state. In Missouri v.

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[1] Under Oregon law, municipal defendants such as appellants only can appeal to challenge the constitutionality of the municipal charters or ordinances they were convicted of violating. This restricted appeal excludes almost all issues upon which criminal appeals usually are based, e.g., trial-court rulings on suppression or admission of evidence, jury instructions, double jeopardy, merger of offenses for sentencing, prosecutorial misconduct, etc. See Jurisdictional Statement at 11-15.

Lewis, 101 U.S. 22 (1880), for example, this Court upheld a system in which appeals from trial courts in certain counties went to an intermediate court of appeals, while appeals from all other counties went directly to the Missouri Supreme Court. The Minnesota Supreme Court upheld a similar system in In re Appeal of O'Rourke, 300 Minn. 158, 220 N.W.2d 811 (1974). See also Whittaker v. Superior Court, 68 Cal. 2d 357, 438 P.2d 358, 66 Cal. Rptr. 710 (1968). The dispute in these cases concerned whether it was permissible to send similar appeals to different courts, not whether it was permissible to restrict the appeal rights of some defendants to the point that an appeal was useless to them as a means to correct trial-court errors.

As discussed in appellants' Jurisdictional Statement (pp. 9-10), Lindsey v. Normet, 405 U.S. 56 (1972), establishes

that a state cannot give a right of appeal to some litigants and arbitrarily deny it to others. That is precisely what Oregon has done here. Defendants such as appellants who are first prosecuted for resisting arrest or disorderly conduct in municipal court (a nonrecord court) have the right to a de novo trial in state circuit court and, in effect, no right to an appeal. See note 1 supra. In contrast, defendants prosecuted for the same offenses in state justice court (a nonrecord court) have the right to a de novo trial in circuit court and a full appeal; and defendants prosecuted for these offenses in state district or circuit court (record courts) have a full right of appeal. See Jurisdictional Statement at 13-15. All defendants receive the same state-court trial and are subject to the same penalties, yet

only defendants who are first tried in municipal court are denied an appeal from the state trial court.[2]

Appellee suggests in its Motion To Dismiss or Affirm that appeal restrictions similar to the one at issue here are relatively common in other states. In fact, it appears that only Oregon, Arizona, and, to some extent, Utah, currently restrict appeals following de novo trial. See Ariz. Rev. Stat. § 22-375 (1975); Or. Rev. Stat. § 221.360 (1979); Utah Code Ann. § 78-3-5 (Supp. 1979). This conclusion is based, in part, on a review of the appellate systems in the 24 two-tier states listed in footnote 4 in Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972).[3]

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2 As the Oregon Court of Appeals held, there is no rational basis for this distinction. Jurisdictional Statement at 34a. The reasons for the distinction are historical, not rational. See id. at 8a-9a.

3 For example, Massachusetts and Kentucky, the states whose two-tier systems were recently

The cases cited by appellee from Louisiana, Nevada, and Oklahoma do not change this conclusion because the appellate systems in those states were modified to eliminate the applicable appeal restrictions after the cases were decided. See La. Rev. Stat. Ann. §§ 13:1896-:1897 (West Supp. 1981), La. Code Crim. Pro. Ann. art. 912.1 (West Supp. 1981)(all defendants given right to appellate review on the record); Nev. Rev. Stat. §§ 189.030-.050 (1979)(lower courts made courts of record, eliminating de novo trials and giving all defendants a record

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3 (continued)

challenged in this Court, gave defendants the same right of appeal following de novo trial in the second tier as they gave all other criminal defendants. See Ludwig v. Massachusetts, 427 U.S. 618, 622 (1976); Colten v. Kentucky, 407 U.S. 104, 113 (1972); Act of March 19, 1964, ch. 72, 1964 Ky. Acts 253 (formerly codified at Ky. Rev. Stat. §§ 21.140, 23.032); Mass. Gen. Laws Ann. ch. 278, §§ 28, 28B (1980). Since the decision in Colten v. Kentucky, Kentucky has abandoned its two-tier trial system and made lower courts record courts. See Ky. Rev. Stat. §§ 22A.020, 23A.080, 24A.010, .110 (1980).

appeal); Okla. Rev. Stat. tit. 11, §§ 27 -129, -132, 28-101, -128 (West 1978 & Supp. 1980-81)(defendants given a full right of appeal following de novo trial). Moreover, Utah has recently converted most of its lower courts to courts of record and has attempted to expand the appeal rights of the remaining defendants who receive de novo trials. See Utah Code Ann. §§ 78-4-1 to -5, -11 (Supp. 1979). Compare Salt Lake City v. Granieri, 16 Utah 2d 245, 398 P.2d 888 (1965), with Utah Code Ann. § 78-3-5 (Supp. 1979). In contrast, the 1979 Oregon legislature defeated a bill prepared by appellants' counsel that would have given municipal defendants a full right of appeal following de novo trial in state court. See Jurisdictional Statement at 9a-10a.

But for the appeal restriction at issue in this case, appellants would be

entitled to a new trial because of legal errors committed by the state trial court. See id. at 42a-44a. Appeal restrictions of the kind at issue here are only imposed by Oregon and two other states. These restrictions violate the Equal Protection Clause of the Fourteenth Amendment as interpreted by this Court in Lindsey v. Normet, supra. No case cited by appellee or the Oregon Supreme Court holds otherwise. This Court should note probable jurisdiction of this appeal to invalidate the appeal restriction contained in Or. Rev. Stat. § 221.360, to reaffirm its decision in Lindsey v. Normet, and to remove doubt raised by the Oregon Supreme Court concerning the constitutionality of the appeal systems used in most other two-tier states (see Jurisdictional Statement at 16-19).

Appellants' argument on the second question presented for review is adequately developed in their Jurisdictional Statement (pp. 23-27) and will not be repeated here.

## CONCLUSION

For the reasons stated above and in appellants' Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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